TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 294.

C. C. CALHOUN, PETITIONER,

vs.

BLAND MASSIE.

WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

PETITION FOR CERTIORARI FILED FEBRUARY 19, 1913.

CERTIORARI AND RETURN FILED NOVEMBER 21, 1913.

(26,936)

(26,935)

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ON ~~PETITION FOR~~ WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 18, 1919.

1 C. C. CALHOUN

VS.

BLAND MASSIE.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, C. C. Calhoun, respectfully represents that he is aggrieved by a judgment of the Circuit Court of the County of Nelson, Virginia, rendered on the 2nd day of February, 1917, in a certain action of assumpsit, in which your petitioner was plaintiff and Bland Massie was defendant, whereby a demurrer of the defendant to the petitioner's declaration was erroneously sustained, as your petitioner is advised. A duly certified transcript of the record of said case is herewith filed as a part of this petition.

Statement of the Case.

The amended declaration, upon which the case was heard, fully sets forth the facts of the case, the demurrer went to the merits thereof, and it was upon the merits as set forth in the declaration that the demurrer was sustained.

The facts, set forth in the declaration, are as follows:

On the 18th day of April, 1911, the said Bland Massie entered into a contract with your petitioner by which your petitioner was to represent him before the Court of Claims of the United States, at Washington, in the matter of a claim of the said Bland Massie,
2 against the Government of the United States, for property of the said Bland Massie which was taken by the United States military forces during the Civil War. The said contract was in the following words and figures, namely:

"Fee Agreement, This Agreement, witnesseth: that I, Bland Massie, of Tyro, Nelson County, Virginia, have employed C. C. [illegible], of Washington, D. C., as my attorney to prosecute my claim against the Government of the United States for property taken by the Federal forces during the late civil war, and in consideration of his professional services in the prosecution of said claim I hereby agree and bind my heirs and legal representatives, to pay to him, his heirs or legal representatives as a fee a sum equal to 50 per cent. of the amount which may be collected upon said claim, said fee to be a lien on any warrant which may be issued in payment of said claim.

"Witness my hand and seal this 18th day of April, 1911, in the City of Washington, District of Columbia.

(Signed) BLAND MASSIE.

Witness to signature:

(Signed) FLORENCE RAY.

FRANCIS L. NEUBECK."

It will be observed that although the fee agreed was to be measured by the amount of the recovery (a "sum equal to" 50 per cent. of the amount thereof) and was to be a lien on the warrant, the undertaking of said Massie was to pay the fee, thus measured, as a personal obligation. This is the plain construction of this contract, for, although the said Massie might, as he did, succeed
3 in collecting enough of the sum recovered to defeat the lien for a part of the fee, he could not thereby avoid his personal obligation and indebtedness.

Your petitioner fully performed his part of said contract and did represent the said Massie before the said Court of Claims, in every phase thereof, as is fully set forth in the declaration, and completely and finally established the said claim to the amount of $1900.00.

At the time of the making of said contract and of the rendering of said services there was no provision in the statute enacted by Congress with reference to such contracts, or otherwise, which rendered said contract or the said fee in any way unlawful. Indeed, therefore the Congress of the United States had in similar cases appropriated money for the payment of such claims and had permitted the collection of similar fees without objection or intimation that it was contrary to the intent of the statutes enacted by Congress. However, an act subsequently passed by Congress appropriating the money for the payment of the said Massie's debt, then already established by the Court of Claims, embodied a provision prohibiting the payment out of said appropriation of the fees to counsel exceeding 20 per cent. thereof and forbidding the receipt of greater fees. The Act of Congress of March 4th, 1915, appropriating the money for the payment of this and other similar claims undertook to make it unlawful to collect any such fees in excess of 20 per cent. of the amount recovered. This provision is in the following words:
4 "That no part of the amount of any item appropriated in this bill in excess of 20 per centum thereof shall be paid or delivered to ore received by any agent, or agents, attorney, or attorneys, on account of services rendered, or advances made in connection with said claims.

"It shall be unlawful for any agent, agents, attorney or attorneys, to exact, collect, with-old or receive any sum which in the aggregate exceeds 20 per centum of the amount of any item appropriated in this bill, on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding $1,000.00."

Thereupon 20 per cent. of the amount of said claim was paid to your petitioner by warrant of the Treasurer of the United States and the balance thereof was paid to the said Massie. The said Massie, taking advantage of the above provision of the statute, refused to perform his contract with your petitioner and although often requested, failed and refused to pay to your petitioner the remaining

30 per cent. of the recovery, balance of the agreed fee, or any part thereof, and it is for this remainder that this suit is brought.

Your petitioner is advised that the said contract between him and the said Massie was a lawful and valid contract at the time it was executed and was in full force and effect at the time the agreed services were rendered him by your petitioner, and also at the time his claim was completely and finally adjudicated and determined by the Court of Claims and that it was not within the power
5 of Congress by said enactment to vitiate and destroy the right of your petitioner to its payment by the said Massie, and that said publication is in derogation of that provision of the 5th Amendment of the Constitution of the United States which provided that no person shall "be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."

The Supreme Court of the United States has in numerous cases upheld the right of counsel to contract for contingent fees, and has sustained the validity of such contracts in numerous cases.

Wylie v. Coxe, 15 How. 415; 14 L. Ed. 753.
Wright v. Tebbitts, 91 U. S. 252.
Stanton v. Embry, 93 U. S. 548.
Taylor v. Bemiss, 110 U. S. 42.

This prohibitory provision of this identical statute also has been the subject of adjudication by various courts, although, so far as your petitioner is advised, it has never been passed upon the Supreme Court of the United States.

In the cases of Ida M. Moyer v. City of Memphis, decided at the April term, 1916; I. M. Moyer v. Thomas Fahey, decided by the Supreme Court of the District of Columbia, reported in Vol. XLIII of the Washington Law Reporter, at page 691; Black v. O'Hara, Admr. (Ky.) decided May 15, 1917, reported on page 623 of the Advanced Sheets of the Kentucky Reports published May 26th, 1917, in all of which cases above cited the statute limiting attorneys was held to be unconstitutional, null and void.

In the last above mentioned case, opinion being rendered by Judge Clark, it was stated.

6 "A contract made by an attorney to prosecute a claim against the United States Government for a fee equal to one-third of the amount recovered, is a valid and enforceable contract, and an act of Congress appropriating money to pay the claim, which had theretofore been judicially determined to be valid, that provided it should be unlawful to receive more than 20 per cent. of the amount appropriated, as an attorney fee, was in so far as it attempted to limit the amount of the fee already earned, unconstitutional and invalid."

The Court, supra, on page 626, further says:

"In so far as this provision of the Act of Congress undertook to limit the amount of fees due a lawyer, under a contract entered before the Act was passed, it is clearly void. Moyers, et als. v. Fahey,

43 Washington Report, 691. By neither the Federal or State law is the contract invalid. Section 3477, Rev. Statutes of the United States; Nutt v. Knutt, 200 U. S. p. 12; Downie case 218 U. S. p. 345; Ramsey v. Trent, 10 B. Mon. 336; Wilhite v. Robert, 4 Dana 172. The Appropriation by Congress to pay this claim was not a bestowal of a bounty, to which conditions as to its use by the recipient might be properly attached, but the payment was in settlement of a claim judicially determined to be just and rightfully due the claimant. It was his private property, to be used and enjoyed as he saw fit, under constitutional guaranty."

7 In the case of Moyers, et als v. Fahey, quoting the opinion of the court in the syllabus, at 691:

"An appropriation by Congress for payment of a claim against the United States for compensation for taking of private property for public use during the Civil War, and the facts of which claim have been established by judicial proceedings in the Court of Claims, is not a gratuity to the claimant, but is the payment of a constitutional demand against the United States. A provision in such act of Appropriation, attempting to limit the compensation of counsel whose services were rendered in the Court of Claims under such contract, and which statutory provision would have the effect of abrogating such contract in part, is in contravention of the Fifth Amendment to the Federal Constitution prohibiting the deprivation of liberty or property without due process of law; and a plea of such enactment fails to state any legal ground of defense to an action by an attorney for the recovery of the agreed fee."

In the case of Black v. O'Hara, supra, at page 628, the Court, citing with approval the case of Allegeyer v. Louisiana, 165 U. S page 578:

"The liberty mentioned in that amendment means not that only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue

8 any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

And the Court further saying:

"While it is true the Congress is not prohibited, as are state legislatures, from enacting laws in impairment of contract obligations, and that such impairment has frequently resulted from its enactments, as is illustrated by the bankruptcy and legal tender laws, the former of which was an exercise of an express power, the latter of an implied power, nevertheless, Congress has no more power than state legislatures, designedly and for that sole purpose, to enact a law to impair the obligation of a contract, because such action is violative of the due process provision of the Constitution. It is only in the legitimate exercise of its express or implied powers that Congress may interfere with contract obligations. In no other sense has it implied authority for such action and it has no express power.

"The considered provision of the Act was not an exercise of either an express or implied power of Congress, and was in contravention of a constitutional guaranty. It results, therefore, that the demurrer to the appellant's answer should not have been sustained on account thereof."

In order that Your Honors may have full information, your petitioner deems it proper to state that the Circuit Court of Nelson County based its decision, in sustaining the demurrer, on a decision of the Supreme Court of the United States, in the case of Ball V. Halsell, 161 U. S. p. 72. But your petitioner is advised that, while a cursory reading of that case might seem to justify the conclusion of the Circuit Court, a careful and critical analysis shows that there is a clear distinction between that case and the case of your petitioner and that the same principles of law are not involved.

In that case, Ball, the attorney, represented Halsell before the Court of Claims for the recovery of compensation for Indian depredations. So far, and only so far, is that case analogous to the one at bar, and there the anology ends. Ball had a contract with Halsell dated May 22nd., 1874. There was no provision of law for the recovery for Indian depredations in that case until the statute of March 3rd. 1891, was passed, and that statute, permitting the suit for that character of claims, forbade the collection of a fee greater than 15 per cent. of the judgment recovered. The statute which gave the right to maintain that suit also limited the amount of compensation to the attorney in such suit.

In the case of your petitioner, at the time the judgment was obtained for Massie before the Court of Claims, the right to sue and obtain judgment existed, without any limitation as to the fee; and at the same time the United States Supreme Court recognized the right to contract for a fee without limitation. In that case, Ball's contract contemplated payment only out of money recovered in that suit; whereas, in your petitioner's case while his fee was a lien upon the funds recovered of the Government, the contract is essentially a personal contract on the part of Massie, for which he is liable independently of any question of a lien upon the funds realized from the suit. The Court in that case recognizes the distinctions your petitioner contends for. It says:

"But in the present case, as has been seen, the original agreement was contrary to the express terms of Act of Congress of 1853. That agreement cannot, as it appears to us, be construed as a promise of the principal to pay the attorney any sum whatever except out of money recovered and received by the attorney from the United States."

In that decision, furthermore, the fact that restriction of compensation to the attorney "was one of the terms and conditions upon which the United States consented to be sued"; whereas, in your petitioner's case that condition was not attached to any statute relating to such cases at the time your petitioner sued and obtained judgment before the Court of Claims for Massie.

In that case, at the time the statute was passed permitting the

suit and restricting compensation, Ball had rendered no services under his contract whatsoever; whereas, in your petitioner's case, when the Act was passed, limiting the fee to 20 per cent. all of the services had already been completely performed.

In that case, the court seems to recognize the principles that, if the contract of Ball with Halsell had been a contract for personal liability and the services had been completely rendered prior to the enactment of the statute prohibiting the collection of fees collected as in your petitioner's case, the contract would be enforceable.

Indeed, one of the grounds upon which the Court expressly
11 based its conclusions was that, it being a unilateral contract of Halsell and not having been performed by Ball on his part prior to the enactment of the act of Congress which forbade compensation in excess of 15 per cent., it did not have the force of a contract at all, and could have been revoked. And the Court seems to rest Ball's right to compensation upon the statute and not upon the contract at all. There is nothing in that case to justify the conclusion that the court would have refused to enforce the contract if Ball's contract with Halsell had placed personal liability on the latter for a fee definitely ascertainable, and the services contracted for had been fully rendered prior to the passage of the act limiting the fee to a less sum than was contracted for as in your petitioner's case.

Your petitioner therefore prays that a writ of error and supersedeas be awarded to the aforesaid judgment of the Circuit Court of Nelson County rendered on the 2nd., day of February, 1917; and that said judgment be reviewed and reversed by your honorable court.

Respectfully,

C. C. CALHOUN,
By Counsel.

L. GRAFTON TUCKER &
VOLNEY E. HOWARD,
Counsel for Petitioner.

I, Volney E. Howard, an Attorney-at-law practicing in the Supreme Court of Appeals of Virginia, do hereby certify that in my opinion the judgment complained of in the foregoing petition should be reviewed by the said Supreme Court of Appeals of Virginia.

Dated January 25th, 1918.

VOLNEY E. HOWARD.

12 Writ of error and supersedeas awarded—bond $150.

M. P. B.

VIRGINIA:

Pleas before the Hon. Bennett T. Gordon, Judge of the Circuit Court for the County of Nelson, on Friday, February the 2nd, 1917.

Be it remembered, that heretofore, to-wit:

At rules held in the Clerk's Office of the said County, on the 1st. Monday in August, 1916, came C. C. Calhoun, by his attorney, and

filed his amended declaration against Bland Massie, which declaration is in the following words and figures, to-wit:

C. C. Calhoun, a citizen of the State of Kentucky, complains of Bland Massie of trespass on the case in assumpsit, for this, to-wit: that heretofore, to-wit: on the — day of —— 19 — the said defendant was indebted to the said plaintiff in the sum of $570.00 with interest thereon from the 5th., day of May, 1915, for the price and value of goods before that time sold and delivered by the plaintiff to the defendant at his special instance and request. And also in the sum of $570.00 with interest thereon from the 5th., day of May, 1915, for the price and value of work before that time, done by the plaintiff for the defendant at his special instance and request.

And also in the sum of $570.00 with interest thereon from the 5th., day of May, 1915, for money before that time lent by the plaintiff to the defendant at his special instance and request;

And also in the sum of $570.00 with interest thereon from the 5th., day of May, 1915, for money before that time paid by
13 the plaintiff for the use of the defendant at his special instance and request;

And also in the sum of $570.00 with interest thereon from the 5th., day of May, 1915, for money before that time had and received by the defendant to the use of the said plaintiff.

And being so indebted, the said defendant, in consideration thereof, afterwards, to-wit: on the day, month and year aforesaid, undertook and faithfully promised the said plaintiff to pay him the said several sums of money in the above Court mentioned, when the said defendant should be thereunto afterwards requested.

Yet the said defendant, not regarding his several promises and undertakin-s, hath not as yet paid to the said plaintiff the several sums of money, or any or either of them, or any part thereof, although often requested so to do; but to pay the same hath hitherto wholly neglected and refused, and still doth neglect and refuse.

Second Count.

And for this also, that heretofore, to-wit, on the 18th. day of April, 1911, the said plaintiff then and now a citizen of the State of Kentucky, and the defendant, Bland Massie, then and now a resident and citizen of the State of Virginia, entered into a written agreement or contract, in the words and figures — follows:

"Fee agreement, This Agreement, witnesseth; That I, Bland Massie, of Tyro, Nelson County, Virginia, have employed C. C. Calhoun, of Washington, D. C., as my attorney to represent my claim against
14 the Government of the United States for property taken by the Federal forces during the late civil war, and in consideration of his professional services in the prosecution of said claim I hereby agree and bind my heirs and legal representatives, to pay to him, his heirs or legal representatives as a fee a sum

equal to 50 per cent. of the amount which may be collected upon said claim, said fee to be a lien on any warrant which may be issued in payment of said claim.

Witness my hand and seal this 18th day of April, 1911, in the City of Washington, District of Columbia.

(Signed) BLAND MASSIE.

Witness to signature.
(Signed) FLORENCE RAY,
FRANCIS L. NEUBECK."

The said plaintiff faithfully and efficiently performed the work required of him by virtue of the aforesaid cont. ct in the prosecution of said claim against the United States Government before the Court of Claims thereof, and has otherwise performed upon his part every requirement and condition of said contract.

The said plaintiff successfully prosecuted the aforesaid claim against the United States Government before the Court of Claims thereof and otherwise in accordance with the aforesaid agreement or contract, and the services rendered by the plaintiff, acting in pursuance and under the aforesaid agreement consisted of (the filing of power of attorney, appearance and petition in the Court of Claims, taking testimony of three witnesses at Tyro, Nelson County, Virginia, filing a thirty five page brief and requests for findings of facts, as well as a four page reply brief in the Court, submitting
15 the case and obtaining a favorable amendment to the findings, filing a brief in opposition to the Government's motion to amend the findings by reducing the amount allowed, having this motion overruled, and filing and securing the allowance of a motion to transmit the finding to Congress) and which allowance by the Court of Claims to the defendant of the sum of $1900.00 was approved and ratified by Congress and an appropriation was made by Congress for the purpose of paying the aforesaid claim as allowed by the Court of Claims and approved by Congress, and which allowance of the sum of $1900.00 to the defendant Bland Massie, on account of his claim against the Federal Government, was paid to him by a United States Treasury warrant, less twenty per cent. of the amount of the claim which was paid to the plaintiff through the Treasury Department of the United — Government by its warrant, on account of his fee, which sum so paid to the plaintiff by the Government was accepted by him, without waiving or releasing any of his rights under the aforesaid contract he had with the defendant for fifty per cent of the amount collected or allowed by the Government.

That the said plaintiff has thus far received only twenty per cent of the amount of said claim allowed in favor of the defendant, and that there is now due the plaintiff under his contract, as mentioned aforesaid, with the defendant, thirty per cent. on the sum so allowed by the Government, to-wit: $1900.00—making a total amount now due the plaintiff of $570.00 with interest thereon from the 5th day

of May, 1915, which amount is wholly unpaid and now due to the plaintiff by the said defendant.

Said plaintiff further alleges that subsequent to the execution of the aforesaid contract or agreement between the plaintiff and the defendant; the performance of the services upon the part of the plaintiff, the nature and kind of which is hereinbefore mentioned, acting in pursuance, under, and in accordance and in compliance
16 with the terms of the aforesaid agreement between the parties, the allowance by the Court of Claims to the defendant in the sum of $1900.00, and after said services in pursuance of said contract had been performed on the part of the plaintiff and the findings or allowances by the Court of Claims had been certified to Congress for action, there was passed, enacted and approved by Congress March 4th, 1915, and appears in 38 Stat. L. p. 962, what is commonly known as "Omnibus Claims" Act Public No. 289, 63rd Congress, 3 Session, a statute entitled "An Act making appropriation for payment of certain claims in accordance with findings of the Court of Claims, reported under the provisions of the Acts approved March 3rd, 1883, and March 3rd, 1887, and commonly known as the Bowman and Tucker Acts, and under the provisions of Section Number One Hundred and Fifty-one of the Acts approved March 3rd, 1911, commonly known as the Judicial Code."

That the claim of the defendant was included and embraced in the aforesaid mentioned Act of Congress making appropriation for its payment.

That by Section 4 at page 996 of the Omnibus Claims Act, approved March 4th, 1915, 38 Sta. L. p. 996 there was a provision limiting and restricting the fee to the attorney for the claimant to the sum of twenty per cent of the amount of the claim as allowed and directed to be paid, which sum of twenty per cent, under Section 4 of said Act should be in full of all claims or demands for services rendered by attorney in behalf of a claimant.

That the payment by the United States Government, through the Treasury Department thereof (by its warrant for twenty per cent. of the amount of the claim so allowed) to the plaintiff as attorney for the claimant, the defendant, Bland Massie, of the sum of $380.00—
17 being twenty per cent. of the amount allowed the defendant on account of his claim, was made and paid in pursuance and under authority of Section 4 of the Omnibus Claims Act. 38 Stat. L. p. 996, but that the plaintiff accepted said warrant from the Government, without in any way waiving, releasing, or relinquishing any of the rights which he had under the aforesaid written agreement he had with the defendant for a fee of fifty per cent of the amount collected on account of said claim.

That the Act of Congress, Omnibus Claims Act, Sect. 4 38 Stat. L. p. 996 is null and void and unconstitutional and of no force and effect in so far and to the extent it may undertake to fix and regulate the amount of fee should be paid to the plaintiff as attorney for the claimant, the defendant, which he had earned under the written agreement with the defendant and which agreement was ex-

ecuted and services performed thereunder prior to the passage of said Act, which agreement specified there should be paid to the plaintiff the sum of fifty per cent of the amount of the claim collected, and hence the plaintiff (notwithstanding the enactment and passage of Section 4 of the aforesaid statute by Congress limiting and restricting attorney fee to twenty per cent of the amount allowed) is now lawfully and rightfully entitled to recover of the defendant the difference between the amount so paid him and the fifty per cent. of the amount collected which he was entitled to under the written agreement, leaving now a balance due him of $570.00.

And being so indebted, the said defendant, in consideration thereof afterwards, to-wit: on the day, month and year aforesaid, undertook and faithfully promised the said plaintiff to pay him the said several sums of money in the above Court mentioned, when the said defendant should be thereunto afterwards requested.

18 Yet the said defendant, not regarding his said several promises and undertakings, hath not as yet paid to the said plaintiff the several sums of money, or any or either of them, or any part thereof, although often requested to do so, but to pay the same hath hitherto wholly neglected and refused and still doth neglect and refuse, to the damage of the said plaintiff of five hundred and seventy dollars ($570.00) with interest thereon from the 5th., day of May, 1915, until paid.

And therefore he institutes this suit.

C. C. CALHOUN.

By Counsel.
L. GRAFTON TUCKER.

C. C. CALHOUN

vs.

BLAND MASSIE.

Demurrer to Declarations.

The defendant, Bland Massie, by counsel, demurs to both the original and the amended declaration filed by the plaintiff, because the said declarations, nor is either of them sufficient in law.

And for the grounds of demurrer the said defendant says: 1st. That the matter and things in said declaration alleged do not show any liability upon the defendant to the plaintiff. 2nd. Because the plaintiff has not debt or claim against the defendant which can be enforced at law.

3rd. Because the claim of the defendant was not a legal demand capable of being enforced against the United States Government.

4th. Because the appropriation made by Congress to pay the said claim, was conditioned upon the application of a certain

19 sum and no more to the plaintiff.

5th. Because the plaintiff took under the Act of Congress

by which the amount to which he would be entitled was limited to the amount which has already been paid to him.

BLAND MASSIE,
By CASKIE & CASKIE,
Att'ys.

And now at this day, to-wit:

At a Circuit Court continued and held for Nelson County at the Courthouse thereof on Friday, the 2nd., day of February, 1917, being the day and year first herein mentioned:

This day came the parties by counsel, and the Court having maturely considered the demurrer to the amended declaration, doth sustain the said demurrer. And it is ordered that this case be dismissed at the cost of the plaintiff, to which action of the Court the plaintiff by counsel excepts.

I, E. L. Kidd, Clerk of the Circuit Court for the County of Nelson, in the State of Virginia, do certify that the foregoing is a true transcript from the records of the said Court in the case of C. C. Calhoun vs. Bland Massie. And I further certify that Caskie & Caskie, Attorneys for Bland Massie, the defendant, have had due notice of the purpose of said plaintiff to apply for a transcript of the record in this case and by consent of parties by their Attys. the original declaration is omitted from this transcript of record.

Given under my hand this 10th., day of Jany. 1918.

E. L. KIDD,
Clerk.

A Copy,
Teste,
H. H. WAYT,
Clerk.

A Copy,
Teste,
H. H. WAYT,
Clerk.

20 VIRGINIA:

In the Supreme Court of Appeals, held at the Courthouse thereof, in the City of Staunton on Friday the 20th. day of September, 1917.

C. C. CALHOUN, Plaintiff in Error,

vs.

BLAND MASSIE, Defendant in Error.

Upon a Writ of Error and Supersedeas to a Judgment of the Circuit Court of Nelson County, Pronounced on the 2nd, Day of February, 1917.

This cause was this day fully heard upon the transcript of the record of the judgment aforesaid and arguments of counsel, but be-

cause the Court here is not yet advised of the order to be entered in the premises time is taken to consider thereof.

Teste,
H. H. WAYT,
Clerk.

A copy,
Teste,
H. H. WAYT,
Clerk.

21 VIRGINIA:

In the Supreme Court of Appeals, held at the Library Building in the City of Richmond, on Thursday, the 14th day of November, 1918.

C. C. CALHOUN, Plaintiff in Error,

against

BLAND MASSIE, Defendant in Error.

Upon a Writ of Error and Supersedeas to a Judgment Rendered by the Circuit Court of Nelson County, on the 2nd, day of February, 1917.

This cause, which is pending in this court at its place of session at Staunton, having been fully heard but not determined at said place of session; this day came here the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore considered that the same be affirmed, and that the plaintiff in error pay to the defendant in error thirty dollars damages, and also his costs by him expended about his defence herein.

Which is ordered to be entered in the order book here and forthwith certified, together with a certified copy of the opinion in this case, to the clerk of this court at Staunton, who will enter this order in the order book there and certify it to the said circuit court.

A copy,
Teste,
H. STEWART JONES, *C. C.*

Defendant in error's costs at Richmond $1.77.

A Copy: Teste,
H. H. WAYT,
Clerk.

22 C. C. CALHOUN

VS.

BLAND MASSIE.

Opinion by Judge Joseph L. Kelly.

RICHMOND, VA., November 14, 1918.

Circuit Court of Nelson County.

This writ of error brings under review a judgment of the circuit court sustaining a demurrer to a declaration in assumpsit. The action was based upon the following contract in writing, dated April 18, 1911;

"Fee agreement. This agreement, witnesseth; that I, Bland Massie of Tyro, Nelson County, Virginia, have employed C. C. Calhoun, of Washington, D. C. as my attorney to represent my claims against the Government of the United States for property taken by the Federal forces during the late civil war, and in consideration of his professional services in the prosecution of said claim, I hereby agree and bind my heirs and legal representatives, to pay to him, his heirs or legal representatives as a fee a sum equal to 50 per cent. of the amount which may be collected upon said claims, said fee to be a lien on any warrant which may be issued in payment of said claim."

The declaration, after setting out the contract, made the following material allegations: That the plaintiff, C. C. Calhoun, faithfully and efficiently performed the work required of him by the contract; that he successfully prosecuted the claim of the defendant, Bland Massie, before the Court of Claims of the United States, involving extensive and varied legal services set out in detail in the declaration;

23 that as a result of these services the Court of Claims found in favor of the claim to the amount of $1,900; that this finding was approved by Congress and an appropriation made to pay the claim; that the same was paid to the defendant by a treasury warrant, less twenty per cent. which was paid by a like warrant to the plaintiff on account of his fee and accepted by him without waiving his rights under the contract to fifty per cent. of the amount; that thus far he has only received twenty per cent. of the sum collected; and that thirty per cent. thereof is still wholly unpaid and due to him by the defendant.

The declaration then proceeds to set out that subsequent to the execution of the contract, subsequent to the performance of the plaintiff's services thereunder, and subsequent to the finding of the Court of Claims and the certification thereof to Congress, an act, commonly known as the "Omnibus Claims Act" was passed by Congress, approved March 4th., 1915, entitled "An Act making appropriations for payment of certain claims in accordance with find-

ings of the Court of Claims, reported under the provisions of the acts approved March 3, 1883, and March 3, 1887, and commonly known as the Bowman and Tucker acts, and under the provisions of section number one hundred and fifty-one of the acts approved March 3, 1911, commonly known as the Judicial Code," (38 Stat. L., p. 962); and that this act, which included the defendant's claim, contained a provision (38 Stat. L., p. 996), limiting fees of attorneys for claimants to twenty per cent. of the amount of the claims as allowed and directed to be paid, said twenty per cent. to be in full of all demands for services rendered by attorneys in behalf
24 of claimants.

The declaration concludes with the following averment or proposition, which raises the only really controverted question presented for our decision, to-wit: That the Act of Congress, Omnibus Claims Act, sec. 4, 38 Stat. L., p. 996, is null and void and unconstitutional and of no force and effect in so far and to the extent it may undertake to fix and regulate the amount of fee should be paid to the plaintiff as attorney for the claimant, the defendant, which he had earned under the written agreement with the defendant, and which agreement was executed and services performed thereunder prior to the passage of said act, which agreement specified there should be paid to the plaintiff the sum of fifty per cent. of the amount of the claim collected.

Several grounds were assigned for the demurrer to the declaration but the one which stated more directly than any of the others the ground chiefly relied upon was, "that the appropriation made by Congress to pay said claim was conditioned upon the application of a certain sum and no more, to the plaintiff." If section 4 of the act was constitutional and valid, this ground was well taken, and the demurrer was properly sustained.

The record before us does not contain a copy of the order entered by the Court of Claims, but merely shows by an averment in the declaration that there was a finding by that court favorable to the claim, and that the same was certified to Congress. The Court of Claims had no jurisdiction to go further in hearing and determining the claim, and manifestly did not undertake to go further, than to ascertain and report the same to Congress, "together with
25 such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as claim, legal or equitable, or as a gratuity against the United States, and the amount, if any, legally or equitably due from the United States to the claimant, etc." (2 U. S. Comp. Stat., p. 1468, sec. 1136, subsec. 1; *Id.* p. 1499, sec. 1142.) Whether the claim would be paid or not, and upon what conditions, still remained a question which depended absolutely upon the will and action of Congress. Whatever legislative recognition had theretofore been given by Congress to the proceedings under which the claim had, up to that time, been prosecuted, nothing had been done to confer upon either Massie or Calhoun any such rights as would thereafter disable that body from imposing any conditions which it might see fit to impose with reference to the payment of the claim. Mr. Justice Van Devanter, in

Gritts vs. Fisher 224 U. S. 640, 56 L. 2d. 928, referring to a contention that a certain act of Congress was unconstitutional and void, because it impaired rights vested by a former act dealing with the same subject, said; "No doubt such was the purport of the act, but that, in our opinion, did not confer upon them (certain members of an Indian tribe) any vested right such as would disable Congress from thereafter making provision for admitting newly-born members of the tribe to the allotment and distribution. The difficulty with the appellant's contention is that it treats the act of 1892 as a contract, when it is only an act of Congress, and can have no greater effect." It is true that Mr. Justice Van Devanter was here
26 discussing a controversy involving Indian tribal property, as to which the United States Government possesses peculiar and plenary administrative power. But the principle involved in that case and in this one is the same, namely, that until Congress had taken some such action as to confer vested rights on the parties, the subject remained within its exclusive power and control. The finding of the Court of Claims, though authorized by statute, is not a judgment, and creates no vested rights. 2 U. S. Comp. Stat. sec. 1142, P. 1506, note 14. The statute authorizing the proceeding in that court confers no new right, save that of making the United States a defendant in a judicial tribunal. 2 U. S. Comp. Stat. sec. 1142, p. 1500, note 1.

In Beers v. Arkansas, 61 U. S. 527, 529, Chief Justice Taney said: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, *and may withdraw its consent whenever it may suppose that justice to the public requires it.*" (Italics added.)

We think there can be no sort of question that the government had the same right in law to reject the claim in toto, or to attach conditions to its payment when the act of 1915 was passed, as it would have had if there had been no statute authorizing the Court of Claims to consider and report upon the matter. The con-
27 dition, therefore, which was incorporated in that act is plainly conclusive of this case. That condition was as follows:

"That no part of the amount of any item appropriated in the bill in excess of twenty per centum thereof shall be paid or delivered to or received by any agent or agents, attorney, or attorneys, on account of services rendered or advances made in connection with said claim. It shall be unlawful for any agent or agents, attorney or attorneys, to exact, collect, withhold or receive any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this act

shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding $1,000.00."

It was, as we have seen, only by virtue of the act of 1915 that the claim became collectible at all, and by its provisions, therefore, the rights of both Massie and his counsel are determined. The act by its terms precluded any contention that the contract sued on in this case could be made to impose a personal obligation on Massie to pay from funds derived from some independent source more than twenty per cent. of the amount of the claim. The language of the enactment indicates a purpose to forestall any such evasion of its purpose, and to that end not only makes it unlawful to pay or receive as a fee more than twenty per cent. of the funds actually appropriated and paid under the act, but also makes it unlawful
28 "for any agent or agents, attorney or attorneys, to accept, collect, withhold or receive any sum which in the aggregate exceeds twenty per cent. of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding."

The judgment of the lower court seems to us, therefore, clearly right, independent of authority; but we do not think that the case, in so far as the fundamental and controlling principles which must be applied in its decision are concerned, can be distinguished from the case of Ball v. Halsell, 161 U. S. 72, 40 L. Ed. 622. It is true that in the Ball case, by the terms of the contract the attorney was to be paid out of the funds recovered and received by him from the United States, and thus contravened the plain terms of the statute involved in that decision. But we have already seen that the contract in the case at bar likewise contravenes a statute which in terms prohibits the payment or receipt as a fee from any source of an amount in excess of twenty per cent of the claim as allowed. It is also true that in the Ball case, the contract for the fee was invalid at the time of its execution, while in the instant case, it only became so by reason of the condition imposed by the subsequent act. This, and other differences which might be adverted to, between the Ball case and the instant case, are circumstantial merely, and cannot be made to differentiate the cases in any substantial respect. Mr. Justice Gray, delivering the opinion of the court, said: "Although he (Ball) prosecuted the claim before the Department of the Interior, and that department recommended payment of a certain sum upon the claim, yet before that sum had been paid, or Congress
29 had made any appropriation for its payment, and, therefore, before he had either recovered or received any money from the United States, or was entitled to any compensation by the terms of the contract now sued on, Congress passed the act of March 3, 1891, Chap. 358.

"By this act, as already stated, Congress, while giving to the court of claims jurisdiction and authority to inquire into and finally adjudicate certain claims arising from Indian depredations, including such as had been examined and allowed by the Department of the Interior, not only declared void all sales, transfers or assignments

of such claims, there-fore or thereafter made—except in the administration of the estates of deceased persons—and all contracts theretofore made for fees and allowances to claimant's attorneys, but expressly provided that all treasury warrants in payment of the judgments of the court should be made payable and be delivered only to the claimant, or to his heirs, executors or administrators, except so much thereof as the court, at the time of rendering the judgment, and as part thereof, should allow to be paid directly to the claimant's attorney, not exceeding in any case 20 per cent. of the amount recovered.

"In view of previous experiences, this last provision was a wise, reasonable and just provision for the protection of suitors; and it was clearly within the constitutional power of Congress."

The principles and authorities which we have discussed seem to us so absolutely conclusive of the controversy that we deem it unnecessary to further prolong this discussion. We were referred to
30 a number of authorities which to a greater or less degree support the contention of the plaintiff in error. (See in particular Moyers v. Memphis 135 Tenn. 263, 186 S. W. 105; Bowman v. Moyers, 47 D. C. App. —, 45 Wash. L. Rep, 771, Black v. O'Hara, 175 Ky. 623; Lay v. Lay (Miss., 79 So. 291.) With reference to these apparently adverse decisions, we deem it sufficient to say that in so far as they are not distinguishable from the present case, we think they are in conflict with the better reason, as well as with the higher authority, of Ball v. Halsell, supra. A more persuasive State Court decision is found in Ralston v. Dunaway, (Ark.) 184 S. W. 425, where the Supreme Court of Arkansas, upon substantially the identical question before us, follows Ball v. Halsell, and reaches the conclusion arrived at by us in this case.

The question involved in this case of course is purely one of law, and it is not perhaps incumbent upon us to say anything in defense of the attitude of the defendant in error. Inasmuch, however, as a very strong appeal was made to us in the oral argument of this case, based upon the alleged natural equity of the plaintiff's claim and the apparent bad faith of the defendant in declining to comply with the plain terms of his written contract, it seems not inappropriate to say that if our conclusion as to the law of this case is right, there is no way by which the defendant could lawfully perform the contract to any greater extent than it has already been performed on his part. Neither he nor his counsel could have dealt with the fund otherwise than as provided for in the appropriation set without becoming liable to the penalty therein prescribed.
31 We are of the opinion that there was no error in the judgment complained of, and the same must be affirmed.

Awarded.

A copy
Teste:
H. H. WAYT,
Clerk.

32 I, hereby certify that this is a complete transcript of the record and proceedings in the Supreme Court of Appeals of Virginia in the cause of C. C. Calhoun vs. Bland Massie; comprising the following papers:

First: Petition, embracing pages 1 to 11 inclusive.

Second: Circuit Court Record, embracing pages 1 to 8 inclusive.

Third: Order of September 20th., 1917.

Fourth: Order of November 14th., 1918.

Fifth: Opinion of the Court, embracing pages 1 to 10 inclusive.

Given under my hand and the Official Seal of the Supreme Court of Appeals of Virginia at Staunton on Saturday the 18th. day of January, 1919.

[Seal Supreme Court of Appeals of Virginia, Staunton.]

H. H. WAYT,
Clerk.

In the Supreme Court of the United States, October Term, 1919.

No. 294.

C. C. CALHOUN, Petitioner,

vs.

BLAND MASSIE.

Stipulation.

It is hereby stipulated between Counsel for each of the parties in e above entitled cause that the record already on file in the upreme Court of the United States as an exhibit to the petition for e writ of certiorari in this case shall be taken as a return to the rit, and that a certified copy of this stipulation be sent by the Clerk the Supreme Court of Appeals of Virginia as his return to the rit, to the Clerk of the Supreme Court of the United States.

CHAS. H. CONSAUL,
Att'y for C. C. Calhoun.
CASKIE & CASKIE,
Att'y for Bland Massie.

TATE OF VIRGINIA,
Supreme Court, ss:

I, H. H. Wayt, Clerk of the Supreme Court of the State of Virnia, at Staunton, and keeper of the records and seal thereof, do ereby certify the above and foregoing to be a true copy of A Stipuation filed with Writ of Certiorari in a certain cause entitled in he Supreme Court of the United States, C. C. Calhoun, Petitioner, . Bland Massie No. 294, October Term, 1919, filed in this office on e 13th day of October, 1919.

I further certify that this certification is made as my return to the id Writ of Certiorari.

Witness my hand and Seal of said Supreme Court, at Staunton, said State, this 18th day of November, 1919.

[Seal Supreme Court of Appeals of Virginia, Staunton.]

H. H. WAYT,
Clerk of the Supreme Court of Appeals of Virginia at Staunton.

34 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of the State of Virginia, Greeting:

Being informed that there is now pending before you a suit in which C. C. Calhoun is plaintiff in error, and Bland Massie is defendant in error, which suit was removed into the said Supreme Court of Appeals by virtue of a writ of error to the Circuit Court of Nelson County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you
35 send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirteenth day of November, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

36 [Endorsed]

File No. 26,935.

Supreme Court of the United States,

No. 294, October Term, 1919.

C. C. Calhoun

vs.

Bland Massie.

Duplicate.

Writ of Certiorari.

37 [Endorsed.]

File No. 26,935.

Supreme Court U. S.

October Term, 1919.

Term No. 294.

C. C. Calhoun, Petitioner,

vs.

Bland Massie.

Writ of certiorari and return.

Filed Nov. 21, 1919.

JAN 30 1920
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 294.

C. C. CALHOUN,
PETITIONER ON *Certiorari.*
vs.
BLAND MASSIE.

MOTION

TO ADVANCE AND TO SET CAUSE FOR HEARING IMMEDIATELY FOLLOWING CASE NO. 85.

J. C. BROOKE,
CHAS. F. CONSAUL,
Attorneys for Petitioner.
FRED. HARPER,
Attorney for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 294.

C. C. CALHOUN,
PETITIONER ON *Certiorari.*
vs.
BLAND MASSIE.

MOTION

TO ADVANCE AND TO SET CAUSE FOR HEARING IMMEDIATELY FOLLOWING CASE NO. 85.

Come now the parties hereto, and respectfully move that this cause be advanced and set for hearing immediately following Case No. 85, entitled Sue Erskine Newman, Administratrix of Estate of Ursula Ragland Erskine, Deceased; Carter Glass, Secretary of the Treasury, and John Burke, Treasurer of the United States, Appellants, v. Ida M. Moyers and Chas. F. Consaul, appellees, and as grounds for this motion respectfully shows to the Court:

1. That the instant case and said Case No. 85 arise under Section 4 of the Act approved March 4, 1915 (38 Stats., 996), involving a limitation on counsel fees in claims made the subject of appropriation by said act.

2. That, while the instant case and said Case No. 85 present different phases or points, both involve either the construction of said statute or its constitutionality, and time may doubtless be saved on oral argument if presented one after the other.

3. That the parties hereto and their counsel, are advised that several suits are pending in trial courts in various jurisdictions, involving points presented in the instant case, and it is believed to be a matter of moment and of public interest and concern that the only two cases pending before this Court, and arising under said statute, be heard one following the other, to the end that all phases involved in said two cases, under said statute, may be presented to the Court on the same day, and that authoritative decision thereon may be rendered by this Court for guidance of other courts or of parties to such other cases pending in trial courts.

Respectfully submitted,

J. C. BROOKE,
CHAS. F. CONSAUL,
Attorneys For Petitioner,
C. C. CALHOUN.
FRED HARPER,
Attorney For Respondent,
BLAND MASSIE.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

No. ———.

C. C. CALHOUN, *Petitioner*,
vs.
BLAND MASSIE, *Respondent*.

MOTION, NOTICE, PETITION AND BRIEF.

MOTION.

Now comes the Petitioner above named C. C. Calhoun, by his counsel, Charles F. Consaul, appearing in his behalf, and moves the court to grant the writ of certiorari as prayed for in the petition heretofore filed.

CHARLES F. CONSAUL,
Attorney for Petitioner.

NOTICE.

Messrs. Caskie & Caskie,

Attorneys for Respondent, Bland Massie.

You will please take notice that on Monday, March 17, 1919, at the opening of the court, or as soon thereafter as counsel can be heard, the above Motion will be submitted to the Supreme Court of the United States.

You will please find attached hereto a copy of the Petition, Brief in support of same, and also a copy of the Transcript of Record, as printed in the United States Supreme Court.

CHARLES F. CONSAUL,
Attorney for Petitioner.

The foregoing Notice is hereby accepted, and delivery of a copy thereof, together with the above mentioned Petition, Brief and Transcript of Record, are hereby acknowledged this day of February, 1919.

Attorney for Respondent, Bland Massie.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. ———.

C. C. CALHOUN, *Petitioner,*

vs.

BLAND MASSIE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

To the Supreme Court of the United States of America:

The petition of C. C. Calhoun for a writ of certiorari directed the Supreme Court of Appeals of Virginia to bring before the Supreme Court the case of C. C. Calhoun against Bland Massie.

The said petitioner would respectfully show to this court as follows:

1. This suit originated in the Circuit Court of Nelson County, Virginia, where judgment was rendered in favor of Bland Massie, defendant. This judgment was affirmed on writ of error by the Supreme Court of Appeals of Virginia, by its judgment filed and entered November 14, 1918, and the record is now in said court.

2. Plaintiff alleged that on the 18th day of April, 1911, the defendant entered into a contract with your petitioner, by which your petitioner was to represent him before the Court of Claims of the United States in the matter of a consitutional claim of respondent, Bland Massie, against the Government of the United States for just compensation for

his private property which was taken by the United States military forces during the Civil War for public use.

3. The contract upon which suit was based, reads as follows:

> "Fee Agreement. This Agreement, witnesseth: that I, Bland Massie, of Tyro, Nelson County, Virginia, have employed C. C. Calhoun, of Washington, D. C., as my attorney to prosecute my claim against the Government of the United States for property taken by the federal forces during the late civil war, and in consideration of his professional services in the prosecution of said claim, I hereby agree and bind my heirs or legal representatives, to pay to him, his heirs or legal representatives, as a fee a sum equal to 50 per cent of the amount which may be collected upon said claim, said fee to be a lien on any warrant which may be issued in payment fos aid claim.
>
> "Witness my hand and seal this 18th day of April, 1911, in the city of Washington, District of Columbia.
>
> BLAND MASSIE.

Witness to signature:

FLORENCE RAY,

FRANCIS L. NEUBECK."

4. The fee agreed upon was to be measured by the amount of the recovery and the contract to pay said fee thus measured was a personal obligation on the part of said Massie.

5. The petitioner fully performed his part of said contract and did represent the said Massie before the Court of Claims and completely and finally established his claim to the amount of Nineteen Hundred Dollars (1900.00).

6. At the time of the making of the contract and of rendering services, there was no provision in any statute enacted by Congress with reference to such claims which rendered the contract or the fee in any way unlawful. On the contrary Congress had in similar cases appropriated money

for the payment of such claims and had permitted the collection of similar fees without objection or intimation that it was contrary to the intent of the statutes enacted by Congress, and by Section 823 U. S. Revised Statutes, had recognized the right of members of the bar practicing in the United States Courts to contract with their clients for payment of fees.

7. The Act of March 4, 1915 (38 Stat. L., 996), subsequently passed by Congress appropriating money for the payment of said Massie's claim, then already established by the Court of Claims, embodied a provision prohibiting the payment out of said appropriation of fees to counsel exceeding 20 per cent thereof and forbidding the receipt of greater fees.

8. The above act undertook to make it unlawful to collect any fee in excess of 20 per cent of the amount recovered. This provision is in the following words:

> "That no part of the amount of any item appropriated in this bill in excess of 20 per centum thereof shall be paid or delivered to or received by any agent, or agents, attorney or attorneys, on account of services rendered, or advances made in connection with said claims.
>
> "It shall be unlawful for any agent, agents, attorney, or attorneys, to exact, collect, withhold or receive any sum which in the aggregate exceeds 20 per centum of the amount of any item appropriated in this bill, on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined a sum not exceeding $1,000."

9. That the said Massie, taking advantage of the above statutory provision, and relying solely thereon, refused to

perform his contract so made with petitioner, and paid to petitioner, or assented to the payment to petitioner, by the Secretary of the Treasury, of a sum equal only to 20 per centum (20%) of said allowance and appropriation, and though thereunto often requested has failed and refused to pay to petitioner the remainder of the fee so contracted to be paid, said remainder amounting to a sum equal to thirty per centum (30%) of said allowance and appropriation; and it was for said remaining portion of said contract fee that suit was brought.

10. And your petitioner further avers that the present case is one in which it is proper for this court to issue a writ of certiorari for the following reasons, among others:

(a) Because your petitioner has been denied a right specially set up and claimed under the Fifth Amendment to the Constitution of the United States.

(b) Because the questions of law involved herein have been decided in petitioner's favor by the highest courts of at least four jurisdictions, thereby presenting a conflict between the decision of the court below and the decisions of several other courts on the points involved.

(c) Because petitioner is a party to another case, now pending in this court, involving the identical point of constitutional law herein involved, which was decided in favor of petitioner by the Court of Appeals of Kentucky, on the ground that said attempted limitation of his fees was unconstitutional, said case being Capital Trust Co., Adm'r of Arnold, vs. Calhoun, No. 368, October Term, 1918; that by reason of the decision of the Virginia Court of Appeals in the case at bar being in favor of the constitutionality of said statute, petitioner is adised that said decision can not be brought before this court for review otherwise than by a writ of certiorari; that the same point being involved in said two cases, the final decision should be the same in

both cases, and such unformity can be assured only by both of said cases being considered by this court.

Wherefore, your petitioner prays that this Honorable Court will be pleased to grant of writ of certiorari in this case to the Supreme Court of Appeals of Virginia, to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

I hereby certify that I have prepared the foregoing petition and that the same contains correct statements founded on the record in this case, and that the petition is well founded, and that the case is one in which the prayer of the petition should be granted by the court.

CHARLES F. CONSAUL,
Counsel for Petitioner.

Washington, D. C.,
February , 1919.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. ———.

C. C. CALHOUN, *Petitioner*,

vs.

BLAND MASSIE, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF IN SUPPORT OF PETITION.

CHARLES F. CONSAUL,
Attorney for Petitioner.

STATEMENT.

This is a suit to recover the balance of an attorney's fee under a contract which was made and entered into between the parties in good faith and was fully performed by the petitioner in that the claim had been finally adjudicated in the Court of Claims and the rights under which contract between the parties had become vested and absolute long prior to the enactment of Congress which attemped to limit the fee to twenty per centum (20%) of the amount recovered.

POINTS AND AUTHORITIES.

Point 1.; Congress can not, in view of the Fifth Amendment, which precludes it from depriving any person of

property without due process of law, legislate so as to destroy a vested right.

Point 2. If it can arbitrarily legislate so as to destroy a part of the fee earned under an agreement made and fully performed by one party in good faith before the enactment of the legislation under consideration, it can legislate so as to withhold or destroy the entire fee since the principle is the same in each instance.

Point 3. It is well settled that a contractual obligation is as much within the protection of the due process clause of the Fifth Amendment as any other form of property. While the Government may destroy a contractual obligation just as it may take personal or real property, where the necessities of the Government require it, yet it may not do so in any case arbitrarily and without the payment of just compensation therefor.

AUTHORITIES.

Black vs. O'Hara, 175 Ky., 623.
Moyers vs. City of Memphis, 135 Tenn., 263, 186 S. W., 105.
Newman vs. Moyers, 47 App. D. C.—45 Wash. Law Rep., 771.
Lay vs. Lay, 79 S. W., 291 (Miss.) 248 U. S.—Decided Nov. 18, 1918.
Monongahela Navigation Co. vs. United States, 148 U. S., 312.
Long Island Water Supply Co. vs. Brooklyn, 166 U. S., 685, 690.

ARGUMENT.

It has been the long approved custom in the Court of Claims for attorneys to take cases upon contingent fees similar to the contract now under consideration, the effect of which Congress has attempted to destroy by the Act of March 4, 1915 (38 Stat. L., 966).

In view of the fact that attorneys receive no fee whatever unless successful, and receive no fee in numbers of claims which are carefully investigated but upon which no suit is instituted, it can not be said that a fee like that agreed upon in this case is unreasonable or excessive. Such contracts between clients and attorneys have been repeatedly upheld by this and other courts. (Stanton vs. Embrey, 93 U. S., 548; Taylor vs. Bemiss, 110 U. S., 42; Nutt vs. Knut, 200 U. S., 12; McGowan vs. Parrish, 237 U. S., 285.)

Not only is the act in question unconstitutional because it deprives your petitioner of a vested right which is property within the meaning of the due process clause of the Fifth Amendment, but it is furthermore unconstitutional as an attempt by Congress to deny to parties that liberty of action which is granted by the Constitution. (Adair vs. U. S., 208 U. S., 161; Allegeyer vs. La., 165 U. S., 578; Williams vs. Fears, 179 U. S., 274; Adams vs. Tanner, 244 U. S., 590.)

Several other courts have sustained this position of your petitioner, including the Court of Appeals of Kentucky, the Supreme Court of Mississippi, the Supreme Court of Tennessee and the Court of Appeals of the District of Columbia.

In view of the reasons herein briefly set forth, it is believed that this court should grant a writ of certiorari in order that this case may be governed by the decision of this court on the constitutional question involved when the same question is determined in the other case now pending before it.

Respectfully submitted,

CHARLES F. CONSAUL,
Attorney for Petitioner.

Supreme Court of the United States

October Term, 1919.

No. 294.

C. C. Calhoun,
Petitioner,
v.
Bland Massie.

BRIEF
OF PETITIONER ON CERTIORARI.

STATEMENT OF CASE.

This case comes up on writ of *certiorari*, addressed to the Supreme Court of Appeals of Virginia.

On April 18, 1911, respondent, Bland Massie, employed petitioner, C. C. Calhoun, an attorney at law, to prosecute the claim of said Massie against the United States, arising from the taking of Massie's private property, for public use. (See fee contract, p. 1, record).

By the terms of said contract, Massie agreed to pay Calhoun as his counsel fee, "a sum *equal to* 50 per cent of the amount" collected. *It is not provided by the contract that said fee shall or must be paid from the particular sum appropriated in payment of the claim of Massie against the United States.*

The case was decided upon the pleadings, to-wit, amended declaration filed by Calhoun, and demurrer thereto, by Massie. (Amended declaration, pp. 6-10, record; demurrer, pp. 10-11, record).

The amended declaration comprised the common counts, and a special count, setting forth the fee contract, the performance of services thereunder by Calhoun, the appropriation by Congress for payment of the claim as allowed by the Court of Claims, and the fee limitation in the act of appropriation, to-wit, Sec. 4, Act of March 4, 1915 (38 Stat. 996).

Massie's demurrer was sustained by the trial court, and the case was carried by Calhoun to the Virginia Supreme Court of Appeals, on error.

The Virginia Supreme Court affirmed the trial court, and in its opinion held that the terms of said fee limitation not only operated to prevent any portion of the fund appropriated, in excess of 20% thereof, being applied to payment of an attorney fee, but that said statute prohibited payment *out of any funds or assets* of an attorney fee of a sum greater than 20% of the sum appropriated. In short, the Virginia court held that the fee limitation was not only a restriction on the use of the appropriated fund, for a certain purpose, but that it also operated absolutely to relieve Massie from any liability under his contract, to pay Calhoun a fee

greater than a sum equal to 20% of the sum appropriated.

The concluding portion of the opinion below also held that even were Massie disposed to comply with his personal contract with Calhoun to pay a greater fee, he was prohibited by law from so doing. Stated somewhat differently, the Virginia court held that the statute in question directly abrogated the valid contract between Calhoun and Massie, and relieved Massie from any obligation thereunder to pay a fee greater than a sum equal to 20% of the sum appropriated, *even if payment might be made from funds other than that appropriated.*

The Virginia court further held that the statute prohibited Massie from voluntarily paying Calhoun a fee greater than 20%, even were he desirous of complying with his contract and even were payment to be made out of funds other than that appropriated.

ASSIGNMENTS OF ERROR.

First. The court erred in holding that Sec. 4 of the Act of March 4, 1915 (38 Stat. 996) does more than to limit the application or use of the fund appropriated, by prohibiting payment from said fund of more than 20% thereof on account of attorney fees.

Second. The court erred in holding that said statute, as construed, does not deprive Calhoun of his property without due process of law, in contravention of the Fifth Amendment to the Constitution of the United States.

ARGUMENT.

Proper Construction Of Sec. 4, Act of March 4, 1915.

The statute here involved, i. e. Sec. 4 of Act approved March 4, 1915 (38 Stat. 996), reads as follows:

> Sec. 4. That no part of the amount of any item appropriated in this bill in excess of twenty per centum thereof shall be paid to or delivered to or received by any agent or agents, attorney or attorneys on account of services rendered or advances made in connection with said claim.
>
> It shall be unlawful for any agent or agents, attorney or attorneys to exact, collect, withhold or receive any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding $1,000.

Said section was considered and construed by this Court in case of Capital Trust Co. v. Calhoun, 250 U. S. 208, in which case this Court said:

> **If the judgment only establishes a claim against the administrator, to be satisfied, not out of the moneys received from the United States, but from other assets of the estate, a situation is presented which, it was said in**

> **Nutt v. Knut, 200 U. S. 12, 21, would not encounter legal objection. In other words, the limitation in the act appropriating the money to 20 per cent as the amount to be paid an agent or attorney would have no application or be involved.**

In its decision, after commenting on the powers of Congress, this Court further said:

> **And we have seen that there was exertion of one of its powers in the present case, not, however, to interfere with or lessen the asserted obligation of the contract between Calhoun and Arnold, but to limit only the application of the money gratuitously appropriated in the payment of attorneys' fees.**

It was then further stated by this Court that the judgment secured in that case by Calhoun was construed by both parties as subjecting the particular money appropriated in said act to the payment of Calhoun's full contract fee, in excess of 20%, *and the judgment was for that reason reversed.*

While the above quotation from the decision of this Court would seem to make plain the fact that the statute involved was adjudged constitutional by this Court *because* it was merely a direction as to the application of the fund appropriated by Congress, the decision of this Court has been construed by the Supreme Court of West Virginia, in a decision rendered Oct. 21, 1919, 100 S. E. 749-750.

That decision was in case of Black v. Crouch, involving the same statute here involved. In that case the West Virginia court said (emphasis ours):

> Since the entry of the decree [by trial court] the Supreme Court of the United States has rendered a decision in which the statute in question has been held to be valid and constitutional. Capital Trust Company v. Calhoun. * * * It holds that the *money appropriated* by the Act cannot be subjected in any manner to a charge for fees in excess of 20 per cent.
>
> * * * * * * *
>
> *The federal decision to which reference has been made does not construe the statute as invalidating such a contract in so far as it may bind or affect money or property of the claimant or his estate, derived from sources other than the appropriation. As the plaintiff may be able to find other assets of the estate of Jacob Crouch, liable to satisfaction of her claim, or liability on the part of some person by reason of assets descended or distributed, she is entitled to have leave to amend her bill, if she shall be so advised.*

It is to be observed from the opinion in Black v. Crouch that Mrs. Black, administratrix, sought by bill in equity to charge the *particular fund appropriated* with payment of the remainder of the agreed attorney fee earned by her deceased husband. It was for that reason that the decree was reversed, with leave to amend the bill, in event plaintiff thought that there might be *other funds* out of which the contract obligation might be made.

In the case now presented, we have the exact converse of the case of the Capital Trust Co. v. Calhoun. In the case at bar the claimant whose claim was presented in the Court of Claims was living. He is still living. His obligation under what has been repeatedly held by this Court to be a valid

contract, is a personal obligation, and any judgment which may be secured against him by Calhoun may be satisfied on execution, under the construction given said enactment by this Court, out of any assets of Massie, otherwise subject to execution, *except the particular fund received by Massie from said appropriation.*

In every jurisdiction there are statutory exemptions from execution seizures and sales. The fee limitation in this act of Congress, as heretofore construed by this Court, is merely an additional statute of exemption, running in favor of Massie.

The existence or non-existence of statutes of exemption, however, has absolutely no connection with or bearing upon the validity of a judgment itself, or upon the right of plaintiff to a judgment. It may so happen that in any case a plaintiff may be successful in securing a judgment, and then learn that his victory is an empty one because the judgment debtor is execution-proof. While it is the understanding of petitioner herein that his former client, Massie, owns property, ample to satisfy any judgment which may be secured against him by Calhoun, *out of assets other than the money appropriated by Congress* in payment of his claim, yet it is wholly immaterial for present purposes whether or not Massie now possesses a dollar or a dollar's worth of property, subject to execution. That may be a matter of decided interest to Calhoun, after Calhoun secures a judgment against Massie; but it cannot enter into a consideration of this case at its present stage.

The only question here involved, really, is whether or not Calhoun is entitled to a judgment

against Massie for the unpaid balance of the fee provided by his contract with Massie.

The attention of the Court is invited to the fact that *in this case Calhoun is asserting no lien upon the fund appropriated to Massie by Congress.* Calhoun does not point out any particular asset or property of Massie, and demand that his claim be satisfied therefrom. All that Calhoun asks is a judgment against Massie for the unpaid balance of the fee contracted to be paid him.

When Calhoun shall have secured a judgment against Massie, and sues out a writ of execution, it will then devolve upon Calhoun, or upon the court officer making a levy on the goods and chattels of Massie, to carefully follow the rule laid down by this Court in Capital Trust Co. v. Calhoun, and to make no levy upon the appropriated fund. Should it so happen that Massie is then found to possess no property subject to seizure on execution (the particular fund appropriated by Congress being among the exempt assets), then Calhoun's judgment may avail him nothing.

However, even so, an unsatisfied judgment may be kept alive from year to year by *scire facias* or by statutory proceedings for that purpose, and it may come to pass that at some future time the judgment debtor may become the owner of property subject to execution, ample to satisfy the judgment. Such cases have been known heretofore. The mere fact that a judgment debtor has no funds *now* subject to execution does not mean that he never will be in a condition to respond.

In any event, however, the matters of execution and satisfaction are mere incidents to the judgment,

to be considered at the appropriate time, but not prior to entering of judgment. Sufficient unto the day are the tribulations of petitioner and of all members of the bar so unfortunate as to represent clients whose claims were included in the appropriation act in question. We are now concerned with the right to the judgment, and will take up the matter of satisfying that judgment when the case reaches that stage.

CONSTITUTIONALITY OF SEC. 4 OF ACT OF MARCH 4, 1915 (38 STAT. 996) AS CONSTRUED BY VIRGINIA COURT.

Deprivation of Property Without Due Process of Law.

As will be noted from a reading of the opinion of the Supreme Court of Virginia, it was held by that court that the fee limitation in the act of March 4, 1915, not only prohibits the application of the appropriated fund to the payment of attorney fees greater than 20% of the sum appropriated to Massie, but that it likewise prohibits the payment of a greater fee, from *any other* fund or asset of the defendant, and prohibits an honestly disposed claimant from voluntarily complying with the terms of his contract to pay a greater fee than 20%, even though such payment might be made from other assets than the fund appropriated.

While that construction of the statute is certainly not in accord with the construction given it by this Court in Capital Trust Co. v. Calhoun, 250 U. S.,

208, and while for that reason, the judgment below should be reversed, we will consider briefly the constitutionality of the act as thus construed and applied by the Virginia court.

Petitioner contends that, as construed by the Virginia court, the statute goes beyond any possible constitutional power of Congress to limit the application or to restrict the use of an appropriated fund. In the case cited this Court held that Congress may exempt an appropriated fund from payment of an existing valid contractual obligation of the payee of such fund, and in that decision petitioner must, perforce, acquiesce. In the instant case, however, and as construed and given effect by the Virginia court, this statute deprives Calhoun of his existing property right *at least* to compel his former client to pay the agreed counsel fee *from other funds than that appropriated.*

Such operation of the statute assuredly deprives Calhoun of his property by legislative fiat, and not by due process of law. It would permit legislative enactment to do exactly what this Court said in the Sinking Fund Cases (99 U. S., 700, 727), could *not* be done, i. e., *"release debts already contracted,"* and *"avoid debts already incurred."*

Calhoun acted as counsel before the Court of Claims in the case of Massie against the United States, under a valid contract. The validity of his contract is apparent from prior decisions of this Court, including that in Capital Trust Co. v. Calhoun, 250 U. S., 208, and is admitted by the Virginia court in its opinion (p. 16, record) where it is said (emphasis ours):

> It is also true that in the Ball case, the contract for the fee was invalid at the time of its execution, *while in the instant case, it only became so by reason of the condition imposed by the subsequent act.*

Before the enactment in question, Calhoun had fully performed the services contracted to be rendered, in the Court of Claims, by securing such a decision from that court as showed the existence of a constitutional obligation of the United States to render Massie just compensation in a named amount, for his private property taken for public use. At least from the date of that decision by the Court of Claims (if not from the commencement of services under said contract), Calhoun had a property right under his contract, *a chose in action.*

A right thus acquired *is property,* as has been fully recognized by this Court.

Reference is made to the case of MacGowan, Executrix, v. Parish, 237 U. S., 285. The right acquired by McGowan by services rendered under a fee contract, survived to his executrix, and obviously an executrix could take nothing by virtue of her office, *save property.* This Court held that McGowan's executrix should recover the fee contracted to be paid, notwithstanding the effort of Parish to dismiss McGowan as his attorney, prior to actual payment of the claim by the Government. That recovery was plainly because McGowan, as counsel, had acquired *property rights* under his fee contract, of which he might not be deprived.

In Osborn v. Nicholson (13 Wall. 654), this Court held that recovery might be had on a promissory

note, after the civil war, though even in payment of the purchase price of a slave. It was there said:

> Rights acquired by a deed, will or contract of marriage, or other contract executed according to the statutes subsequently repealed, subsist afterwards as they were before, in all respects as if the statutes were still in full force. This is a principle of universal jurisprudence.

In rejecting the contrary contention, the Court further said:

> The proposition, if carried out in this case would, in effect, take away one man's property and give it to another. And the deprivation would be "without due process of law." This is forbidden by the fundamental principles of the social compact, and is beyond the sphere of the legislative authority both of the States and the Nation.

That a *chose in action is property* is recognized by federal statute. Sec. 11 of the first Judiciary Act, 1 Stat. 73-79; Sec. 24, Paragraph 1, of present Judicial Code.

In Sheldon v. Sill, 8 How. 441-449, it was said:

> The term "chose in action" is one of comprehensive import. It includes the infinite variety of contracts, covenants, and promises, which confer on one party a right to recover a personal chattel or a sum of money from another, by action.

Further, a chose in action is none the less property before it is actionable, as well as after a cause of action exists. Haskell v. Blair, 57 Mass. (3 Cush.) 535, where it is said:

> A note, bond or other promise not negotiable, is denominated a chose in action, before the promissor or obligor is liable to an action on it, as well as after.

The mere uncertainty as to time of payment of Massie's claim by the United States, and which act of payment would fix the right of Calhoun to sue on his contract, does not detract from the *property right* of Calhoun under his contract, although it may affect the *value* of the right. The same uncertainty of time and value exist in matter of estates in remainder, and more especially in contingent remainder; but those estates are none the less property, and once vested, cannot be taken away by legislative enactment. Green v. Edwards, 31 R. I. 1; 77 Atl. 188.

In Willoughby on the Constitution, it is said:

> No specific inhibition is laid upon the Federal Government by the Constitution with reference to the impairment of the obligation of contracts. That Government is, however, forbidden by the Fifth Amendment to deprive persons of property without due process of law, or to take private property for public use without just compensation. In so far, then, as contract rights may be treated as property they are protected from direct impairment by Federal action.

See, also: Pacific Mail Steamship Co. v. Joliffe, 2 Wall. 450. Sinking Fund Case (U. P. R. R. Co. v. U. S.), 99 U. S. 700.

Citations bearing on this point might be indefinitely multiplied. The law would seem settled, however.

In adopting the construction announced in the case of Capital Trust Co. v. Calhoun, 250 U. S., 208, this Court evidently followed the only construction which it considered could possibly permit the statute involved to bear the test of constitutionality. If construed according to the theory of the Virginia court, then section 4 of said act most assuredly does operate to deprive Calhoun of his property without due process of law, and therefore it must be held unconstitutional.

In brief, we submit that the Virginia court erred in its construction of the fee limitation section, and for that reason, its judgment should be reversed. If, however, the court below did not err in construing said section, then it erred in holding said enactment constitutional *as construed.*

Assuredly, in the light of the decisions of this Court, above cited, as to the limitation on the right of Congress to deprive a citizen of property without due process of law; in the light of the decisions holding that contractual rights are property, and that choses in action constitute property, and of the obvious fact that the statute, as construed by the Virginia court in this case, operates to take the property of Calhoun and to present it to Massie, there would seem to be no room for reasonable doubt as to the unconstitutionality of the statute unless restricted in its operation to the particular fund appropriated by the act, as construed by this Court in the case of Capital Trust Co. v. Calhoun (250 U. S., 208).

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 294.

C. C. CALHOUN, *Petitioner,*

vs.

BLAND MASSIE.

PETITIONER'S REPLY BRIEF.

CONSTRUCTION OF SEC. 4, ACT OF MARCH 4, 1915.

Petitioner insists that the court below erred in construing the act in question as going further than to limit the proportion of the sum appropriated in payment of each claim, which may be applied to payment of counsel fees.

Learned counsel for respondent assert that the opinion of this Court in Capital Trust Co. vs. Calhoun, 230 U. S. 208, does not sustain our contention; but that opinion would seem to speak for itself on this point, and the Supreme Court

of West Virginia plainly adopted the same construction of that opinion for which we here contend.

In short, in discussing the effect of the section in question, this Court said in substance, that in event the plaintiff sought only to establish his claim or demand for the agreed counsel fee, to be paid out of funds other than that appropriated, then such effort "would not encounter legal objection."

Counsel for respondent, in the effort to show why an agreed and earned counsel fee should not be paid by their client, say that the concluding or penalty portion of the section involved would have no effect if the section is construed as contended by petitioner.

With that statement we cannot agree, however. If it is made a misdemeanor to "exact, collect, withhold or receive" a fee greater than 20 per cent, out of the fund appropriated, certainly the statute would tend to exercise a deterrent effect upon any counsel who might possibly have it within his power to exact, collect, withhold or receive more than a 20 per cent fee from the particular fund appropriated.

In short, the penal part of the statute goes just as far as the directing part, and that is as far as the power of Congress can extend over the *subject matter*. That is, both parts of the statute, as construed by this Court in its opinion in the earlier case, and as construed by the West Virginia court on authority of this Court, are given effect as applying only to a *subject matter* held by this Court to be within the constitutional control of Congress, i. e., the particular fund appropriated by Congress.

It is a further fact painfully well known to members of the bar affected, that in most of the individual claims covered by the act involved, the former client is an estate, utterly destitute of assets save the fund brought in by the professional services of counsel. In all such cases, the statute as

construed in Capital Trust Co. vs. Calhoun will preclude counsel from collecting their earned and agreed fees in excess of 20 per cent of the sums appropriated. In some cases, however, the former claimants and clients appear in their individual capacities, and the instant case happens to be one of them, Massie having collected the claim in his own right, and supposedly being possessed of means other than the fund appropriated in satisfaction of his claim against the government.

It is true that this Court, in concluding its consideration of the case of Capital Trust Co. vs. Calhoun, said that it was unnecessary to go further than to hold that Calhoun could not be paid more than 20 per cent "out of the monies appropriated by Congress"; but the *reasoning* of the Court, upon which the conclusion is based, shows clearly that this Court sustained the constitutionality of the statute, *because the statute did not go any further than the extent attributed to it.*

That being obvious, then the converse must be equally true, *and the statute, if extended by construction to control any fund or assets other than the fund appropriated by Congress, must be unconstitutional and void.*

It is also true that in the West Virginia case cited, (Black vs. Crouch, 100 S. E. 749) that Court declined to decide the right of Mrs. Black, widow and administratrix of deceased counsel, respecting funds other than the fund appropriated; but it remanded the case with leave to Mrs. Black to amend her bill in event she was advised that there were other funds which might be subjected to her claim, thus showing in the plainest manner possible, that the Court construed the statute as *not* applying to other funds than the fund appropriated.

The refusal of the West Virginia Court to pass upon Mrs. Black's right to such other fund was merely in order

not to prejudge the question of whether any particular fund made the subject of demand by Mrs. Black might or might not be legally subject to that demand. Into the decision of that question many points of state or local law governing the distribution and settlement of estates, or perhaps the doctrine of estoppel, might be involved, which would have to be decided on the facts presented, and which in the nature of the case could not be prejudged. That is all that was reserved by the West Virginia court. To construe its decision otherwise would be to construe away the effect of the order of remand.

In the first two paragraphs at top of p. 3 of respondent's brief, learned counsel have plainly fallen into error. If they mean to say that the statute involved in Capital Trust Co. vs. Calhoun prohibited payment of *any* counsel fee out of the sum appropriated, then they err, as that case involved the identical section here involved.

If, on the other hand, they are to be understood as stating that the Nutt case (Nutt vs. Knut, 200 U. S. 12), cited by this Court, involved a statute that prohibited payment of counsel fees from the money appropriated, they err, for the Nutt case did not involve any act dealing in any manner with counsel fees or their payment, either from the money appropriated or otherwise. The Nutt case merely involved the question of whether the fee contract there presented amounted to an attempted *assignment of an interest in the claim,* contrary to Sec. 3477 R. S.

CONSTITUTIONALITY OF STATUTE AS CONSTRUED BY VIRGINIA COURT.

Counsel for respondent adopt a mistaken premise in suggesting that we entertain the theory that Massie was *indebted* to Calhoun prior to the making of an appropriation for payment of the Massie claim against the United States. Such

is not our contention. The principle which we believe to be controlling, however, is that at least from the time Calhoun secured from the Court of Claims a finding of such facts as showed Massie's claim to be a constitutional demand, which Congress was under a constitutional *duty* to pay, Calhoun had a *chose in action* against Massie, precisely as the holder of an unmatured note has a chose in action against the marker, and this even though there be no present right to sue. This principle was plainly recognized and followed in McGowan vs. Parish, 237 U. S. 285, McGowan's vested right to his agreed fee, before payment of the claim of Parish, having been sustained, even though he had no right of action until payment of the claim by the government.

We further contend that such chose in action was *property*, belonging to Calhoun. If it was property of Calhoun, then it was not within the constitutional power of Congress to deprive Calhoun of that property without due process of law, and mere legislative enactment does not constitute due process of law.

Opposing counsel seek to avoid the logical effect of this line of reasoning by saying that the right of Calhoun was "a contingent right, not a vested right." To that statement we cannot assent. Is the right of the insured under a fire insurance policy not a vested right, even though there may never be a loss by fire? The *right which is vested* in the insured and for which he pays a consideration (premium), is the *right* to demand payment when and if a certain event comes to pass. So, of Calhoun. His *vested right* was the right to demand payment of a certain sum of money, equal to a described proportion of the sum paid in satisfaction of Massie's constitutional demand against the United States, *when paid* by an appropriation made by Congress. That was a contractual right, and being such, it constituted *property*. Hence the attempt of counsel for respondent to avoid

the conclusion which must be drawn from these well established legal principles, cannot avail.

Opposing counsel insist that as Calhoun had no *suable* right prior to the making of an appropriation in favor of Massie, so Calhoun had *nothing*. Under a surety bond conditioned on the faithful performance of duty by a bank cashier, has the assured bank no right until the cashier defaults? Can the bonding company which has received a consideration for entering into the undertaking, cancel and annul the bond at its pleasure? To state the proposition is to answer it. Yet the assured bank may never have any *cause of action* against the bonding company.

In the case supposed, however, the bank has brought a certain right, for an agreed consideration, and the bonding company cannot be absolved from its duty under the bond. So, in the instant case, Calhoun earned a certain right, by his professional services, under a contract which was valid when made, and was valid when Calhoun's services were rendered. Did Calhoun have no rights in the premises which any one was bound to respect?

At the foot of p. 7 and top of p. 8 of respondent's brief, it is stated that the case of Frisbie vs. U. S. 160 U. S. 162, is applicable to this case, because "The Government was no more bound to pay the war claim than it was to give the pension, and the claim for compensation for property taken during the Civil War was a simple claim, and no more, and neither Massie nor Calhoun had any vested right for the satisfaction of which they could demand an appropriation."

Let us examine this quoted statement. The *Constitution provides that private property shall not be taken for public use without just compensation,* but it does not confer any right to a pension. When the Government took Massie's private property for public use, did not Massie have a *constitutional* demand against the Government? Could the

absence of a forum wherein to assert that demand operate to change the *nature* of his demand?

His claim or right to demand from the Government that *"just compensation"* promised him by the Constitution was assuredly a property right, a right that would descend or pass to his legal representatives. That cannot be gainsaid, for examination of this same Act containing appropriation for payment of the Massie claim (38 Stat. 962) shows that 183 of the items of appropriation were made payable to *administrators, executors,* or *legal representatives.* Obviously an administrator or executor or legal representative can take nothing by virtue of his office save *property.* Hence it follows that on the face of this very Act Congress has enacted in the most striking manner possible that these claims for "just compensation" were property.

This Court in Williams vs. Heard, 140 U. S. 529, follows exactly this thought, and therein the Court was called upon to decide whether a claim for part of the fund paid by Great Britain to the United States as a result of the Geneva Award (Alabama Claims), was a mere request for the granting of a *gratuity,* or a *property right,* which could pass to another.

After stating that payment of such a claim must await action by Congress, and that no individual claimant had any lien on the fund, and that Congress was under no compulsion to ever distribute the fund, the Court said (emphasis ours):

> There was, undoubtedly, a moral obligation on the United States to bestow the fund received upon the individuals who had suffered losses at the hands of the Confederate cruisers; and in this sense all the claims of whatsoever nature were possessed of greater or less pecuniary value. There was at least a possibility of their payment by Congress—an expectancy of interest in the fund, that is, a possibility coupled with an interest.

> There was thus at all times a possibility that the Government would see that they were paid. There was a possibility of their being at some time valuable. They were rights growing out of property; rights, it is true, that were not enforceable until after the passage of the Act of Congress for the distribution of the fund. *But the Act of Congress did not create the rights. They had existed at all times since the losses occurred.* They were created by reason of losses having been suffered. All that the Act of Congress did was to provide a remedy for the enforcement of the right.
>
> *The claims in this case differ very materially from a claim for a disability pension, to which they are sought to be likened; they are descendible; are a part of the estate of the original claimants which, in case of their death, would pass to their personal representatives and be distributable as assets, or might have been devised by will; while a claim for a pension is personal, and not susceptible of passing by will, or by operation of law, as personality.*

Again, in Mitchell vs. Harmony, 13 How. 115, 134, this Court, in speaking of the right of the Government to seize private property for public use, said:

> Unquestionably, in such cases, the Government is bound to make full compensation to the owner.

The same principle was laid down in U. S. vs. Russell, 13 Wall. 623, 629.

We refer to these cases, decided by this Court, merely to emphasize the thought that when Congress appropriated money to pay the claim of Massie, it was not making a donation to Massie; it was not granting a gratuity to him. On the contrary, in paying Massie the "just compensation" ascertained by the Court of Claims to be due him, under the Constitution, Congress was merely fulfilling a constitutional obligation—a plain constitutional duty.

If it be conceded, in light of Capital Trust Co. vs. Calhoun, that as an incident to the making of an appropriation pursuant to a constitutional obligation to make the appropriation, Congress has a right to direct the application of the fund appropriated, *yet it still does not and cannot follow that Congress has any right as an incident to making the appropriation, to relieve Massie of his own legal obligations to Calhoun, based on a valid contract, theretofore made, and by Calhoun fully executed.* No such power in Congress can be found in the Constitution, save under the bankruptcy clause.

In this connection also, we wish to emphasize the fact that in the instant case *Calhoun makes no claim whatever against the United States.* Calhoun never had any claim against the Government. His claim has at all times been a contractual right as *against Massie,* based on a valid, private contract, made between two citizens, each of whom was *sui juris.*

Counsel for Massie contend, in effect, that as a condition to paying Massie what is due him under the protecting terms of the Constitution, Congress can relieve Massie from payment of *his own debt to Calhoun,* even though Calhoun is not seeking to enforce payment out of the fund appropriated by Congress.

The contention of respondent amounts practically to this: That if A, the owner of real estate, agrees to pay B a certain commission in event of making a sale to C, then C, in paying A for the property, can attach a condition that not only shall A *not* pay the full agreed commission due B, out of the fund paid as a purchase price, but C may also attach the condition that A shall not pay that full commission out of any other money that he may have. If there be any constitutional warrant for any such theory, then counsel for petitioner must confess ignorance.

To that portion of argument of opposing counsel found on page 8 of their brief, dealing with the allegations of our petition for *certiorari*, we have only to say that not having the gift of prescience, we could not know that this Court was to decide that the statute involved is constitutional to the extent that it controls the appropriated fund. Therefore we do not feel that the Court will charge us with any attempt to mislead when we stated in our petition for *certiorari* that the identical point was involved in case of Capital Trust Co. vs. Calhoun, and in the case now presented. Obviously, however, in the light of the decision of the earlier case, a difference is to be drawn between the two cases in that this Court said in Capital Trust Co. vs. Calhoun that it was shown there was no fund in possession of the administrator defendant save the appropriated fund, and it was held that said appropriated fund was not chargeable with payment of more than a fee of 20 per cent, while in the instant case it has not been in any manner pleaded, alleged, intimated or admitted that Massie is without assets other than the appropriated fund. However, we have fully covered the matter of *execution* in our original brief.

If Massie has no funds subject to execution, then a judgment against him may be a matter of no special concern to him. If Calhoun can make a judgment out of assets of Massie *subject to execution*, then Calhoun is entitled to the benefit of that right.

The cases of Beers vs. Arkansas, 20 How. 529, and Gritts vs. Fisher, 224 U. S. 640, cited on p. 9 of brief of respondent, have no bearing on the case or question here presented.

As to the quotation on p. 10 of respondent's brief, from the opinion of this Court in Capital Trust Co. vs. Calhoun, and whereby it is held that the fee limitation is constitutional, we ask special attention to a portion of that quota-

tion, descriptive of the *effect* of the statute considered, and reading as follows (emphasis ours):

> But there are other elements to be considered—there is the element of the condition Congress imposed *on the subject-matter* of the controversy, regarded as a condition of its grant.

Obviously the *"subject-matter"* of the condition was the *fund appropriated.* It could be nothing else. That is precisely the theory for which we here contend—that the fee limitation is a condition laid solely upon the use of a certain, specified, appropriated *fund,* and that it is nothing else.

Replying to next to the concluding paragraph of respondent's brief, as to the lack of good faith of either Massie or Calhoun if they accepted the appropriation and then violated the conditions subject to which it was given, it occurs to us to suggest that *Massie was the party who accepted the condition—not Calhoun.* It is true that Calhoun accepted the 20 per cent fee allowed by the act, but he did so *without waiver* of his right to proceed *against Massie* for recovery of exactly the thing which Massie had legally contracted to pay to Calhoun.

While with the wisdom of legislation the courts have no judicial concern, their function being but to declare the law applicable to cases presented, yet it is obvious that, as construed by this Court in Capital Trust Co. vs. Calhoun, the statute involved is one which cannot commend itself as fair or just, because it strikes down contractual rights, which were valid when they accrued, and *after* one of the parties to the contract has fully performed his duties thereunder. As previously construed in most cases covered by the appropriation Act, it leaves attorneys with an empty right save as to the limited extent specified by the Act, i. e., that of making their full contract fee beyond 20 per cent *provided*

they can find assets subject to execution, to cover the balance of the contract fee.

It would assuredly seem that no pressing public interest, no principle of right or justice, can be invoked as a ground for now asking the Court to extend the operations of such an enactment to cover more than the fund appropriated in satisfaction of each claim.

The Court has heretofore reached a conclusion that the statute is valid so far as it constitutes a condition imposed on the *fund appropriated*, and to the decision announced members of the bar must bow; but they trust that the Court may adhere to the *reasoning* by which that conclusion was reached, and if so, then the judgment of the Virginia court herein must be reversed, with directions to enter judgment in favor of Calhoun, subject if to any condition, only to the condition that Calhoun shall not make his judgment for the balance of his fee out of the *appropriated fund*.

Respectfully submitted,

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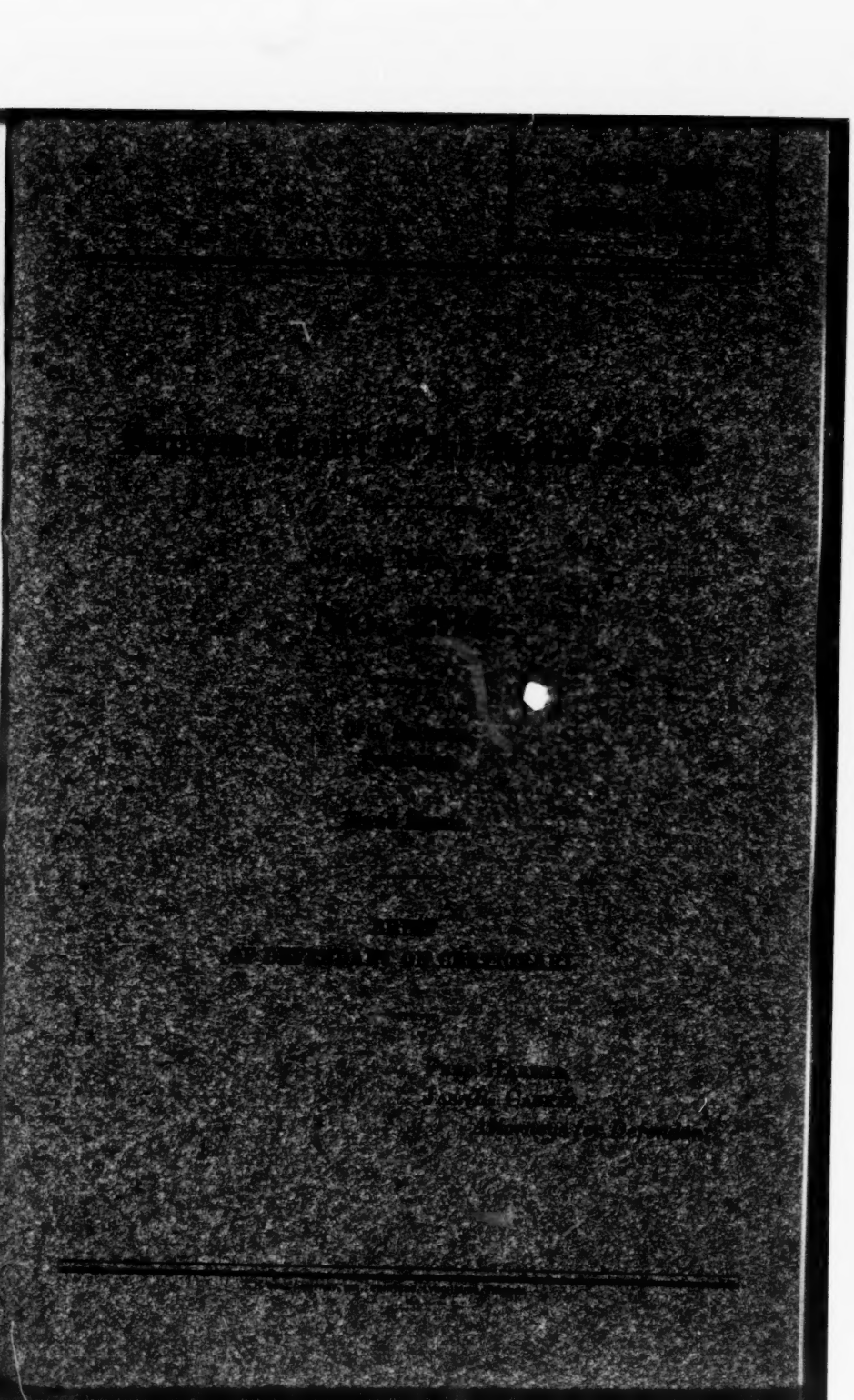
C. C. CALHOUN.



Supreme Court of the United States

October Term, 1919.

No. 294.

C. C. Calhoun,
Petitioner,
v.
Bland Massie.

BRIEF
OF DEFENDANT ON CERTIORARI.

STATEMENT OF CASE.

The brief for the petitioner correctly states the facts of the case, and we have no desire to add anything thereto, except such additional facts as will be brought out incident to the argument herein. We desire to call attention to the fact that the last paragraph under petitioner's "Statement of Facts," to the effect that the Virginia Court of Appeals held that:

> "The statute prohibited Massie from voluntarily paying Calhoun a fee greater than 20%, even were he desirous of complying with his contract, and even were payment to be made out of the funds other than that appropriated,"

states an immaterial proposition, a moot question. The only issue before this Court is whether Calhoun is entitled to a judgment against Massie.

ASSIGNMENTS OF ERROR.

We take these assignments up in the order in which they occur in the brief opposite.

First:

> That "the Court erred in holding that Section 4 of the Act of March 4, 1915 (38 Stat. 996), does more than to limit the application or use of the fund appropriated, by prohibiting the payment from said fund of more than 20% therof on account of attorney fees."

The statute itself would seem to be a sufficient answer to this contention, for the statute, as set out on page 4 of the brief opposite, not only specifies that no part of the money appropriated in the bill, in excess of 20% shall be paid on account of attorneys' fees, but, it further provides that it shall be unlawful

> "to exact, collect, withhold or receive any sum which, in the aggregate, exceeds twenty per centum of the amount of any item appropriated in this bill, on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding."

The statute then provides a maximum penalty of $1,000 for violation of the Act. The statute is so plain that the very discussion of it confuses. The first part of Section 4 provides that no more than 20% of the *amount appropriated* shall be paid. If the contention opposite were true, then the provision of the last part of Section 4 of the Act of March 4, 1915, is simple verbosity, and has no effect, and would be useless in the act. The effect of this is to make it unlawful to *"exact, collect, withhold or receive"* any sum in excess of 20% of the amount appropriated, etc.

Counsel opposite refer to the decision in the case of Capital Trust Co. v. Calhoun, 250 U. S. 208, in which the limitation in question was declared to be constitutional, in so far as it applies to the actual fund appropriated by Congress, and quote the opinion to the effect that if a judgment only establishes a claim against the administrator, to be satisfied, not from the monies received from the United States, but from other assets of the estate, "a situation is presented which, it was said in Nutt v. Knut, 200 U. S. 12, 21, would not encounter legal objection."

We call attention, however, to the last part of the paragraph quoted as follows:

> *"In other words, the limitation in the Act appropriating the money to 20% as the amount to be paid an agent or attorney would have no application or be involved."* (Italics ours.)

As is clearly indicated by the italicized quotation, the Court was then dealing with an act which simply prohibited the payment out of the money actually appropriated, and was not referring to a case such as the one at bar, where the act goes further, and prohibits the *exacting, collecting or receiving of any sum in excess of 20%*. In the Nutt case the statute under consideration (Section 3477 of the Revised Statutes) simply declared null and void "all *transfers and assignments of a claim on the United States* . . . etc."

Furthermore, we call attention to the fact that the opinion in the Capital Trust Co. case expressly stated that the Court did not undertake to pass on the moot question as to whether money, in excess of 20%, could be collected from sources other than the money actually appropriated by Congress. This is clearly shown by the concluding paragraph of the opinion of Mr. Justice McKenna, as follows:

> "We conclude, therefore, that Calhoun's claim for a balance due as fees can not be paid out of the monies appropriated by Congress, and now in the hands of the administrator *de bonis non*, or recognized as having any validity as against that fund. BEYOND THIS WE NEED NOT GO." (Capitals ours.)

Thus the Court did not hold that the Act of March 4, 1915, did not prohibit the payment of attorneys' fees in excess of 20%, provided that such payment should not come out of the fund actually appropriated by Congress, but on the contrary, expressly refused to pass on this question which was a moot one in that case. In view of the above, we beg to differ with counsel for petitioner as to the effect of the decision in the Capital Trust Co. case.

The case of Black v. Crouch (West Va.), 100 S. E. 749, is also cited by counsel opposite as sustaining their construction of the decision in the Capital Trust Co. case. They quote from the case of Black v. Crouch to the effect that the decision in the Capital Trust Co.

case simply held that the money actually appropriated by Congress can not be subjected in any manner to a charge for fees in excess of 20%, and that the **Federal** decision did not construe the statute as invalidating such a contract "in so far as it may bind or affect money or property of the claimant or his estate, derived from sources other than the appropriation."

We call attention, however, to the fact that counsel opposite fail to complete the quotation, which clearly shows that the West Virginia court did what it construed this Honorable Court to do in the Capital Trust Co. case, that is: leaves the question open; for while it is true that the West Virginia case, as shown by the quotation on page 6 of the brief opposite, remanded the case, with leave to the plaintiff to amend her bill *if she be so advised*, and is able to find other assets of the estate of Jacob Crouch, yet the Court does this with the express reservation, which is omitted in the quotation opposite, as follows:

"BUT NOTHING IS NOW DECIDED AS TO HER RIGHT RESPECTING OTHER FUNDS." (Capitals ours.)

In short, the West Virginia court in the Crouch case, just as this Honorable Court in the Capital Trust Co. case, refused to pass on the moot question, but only passed on the question actually before the Court at the time.

In view of the plain language of the Act itself, and the, what seems to us, evident misinterpretation by learned counsel for petitioner of the effect of the decision of this Honorable Court, and of the Court of West Virginia, in their interpretation of the statute, it would seem unnecessary to discuss the questions raised in the brief opposite, as to whether the defendant in error has other funds out of which the recovery can be had, but we rather accept the statement in the brief opposite that "the only question here involved, really, is whether or not Calhoun is entitled to a judgment against Massie for the unpaid balance of the fee provided by his contract with Massie."

The purpose of the Act of Congress is plain, and similar purposes in cases of this kind have been expressly approved by this Honorable

Court in the case of Ball v. Halsell, 161 U. S. 72, 40 L. Ed. 622, where the Court, in referring to a provision limiting attorneys' fees said:

> "In view of previous experience this last provision was a wise, reasonable, and just provision, for the protection of suitors, and it was clearly within the constitutional power of Congress."

It would seem to be a distinction without reason to say that under the Act in question the contract amount may be recovered, provided you take it out of the left-hand pocket of the defendant; but it can not be recovered if it is to come out of the right-hand pocket. It would also result in an unjust and unequal working of the law to so construe it that the contract price might be recovered from a defendant who happened to have funds other than the amount appropriated by Congress, but can not be recovered from a defendant who has no other fund except that; and, further, it would absolutely defeat the purposes of Congress to say that the contract price might be recovered, provided it come from other sources, for if a defendant is to pay, it is obviously and entirely an immaterial matter whether he pay the amount out of the amount appropriated by Congress or whether he pay it out of other assets. In fact, in the ordinary course of business, the money would be deposited in bank, along with other funds, and if a check were to be given, it would be impossible to differentiate between the money appropriated by Congress and the other money. The language of the statute itself, as stated, is plain, and prohibits the payment of or receiving of any sum, in excess of 20% of the amount appropriated as attorneys' fees, no matter from what source it may come. This is the plain wording of the statute, and, as it appears to us, the only sensible and sane interpretation thereof.

We, therefore, come to the second assignment of error, that is: as to the

CONSTITUTIONALITY OF SECTION 4 OF ACT OF MARCH 4, 1915, AS CONSTRUED BY VIRGINIA COURT.

In this connection we earnestly commend to the Court the opinion of Judge Kelly, of the Virginia Supreme Court of Appeals, as found on page 13 to 17 of the Record, which fully sets out the case from the point of view of the defendant in error. We might rest content with reference to this opinion were it not that the learned counsel opposite have brought in some extra considerations which need comment.

The argument opposite seems to be based on the premises that at the time Congress appropriated the money for the Massie claim, the petitioner, Calhoun, had a *debt already existing* against Massie. This is the premise on which counsel opposite base their case, and we respectfully submit that the premise is a mistaken one, and that the argument based thereon therefore falls. The case is not a case of a debt such as that involved in the Sinking Fund cases (99 U. S. 700, 77), where the Court said that legislatures could not "release debts already contracted," and "avoid debts already incurred."

As set up in the opinion of Judge Kelly (Rec., p. 14) the Court of Claims had no authority to do more than report facts to Congress, together with its conclusions, and "whether the claim will be paid or not, and upon what conditions, still remained a question which depended absolutely upon the will and action of Congress. . . . Nothing had been done to confer upon either Massie or Calhoun any such right as would thereafter disable that body from imposing any conditions which it might see fit to impose with reference to the payment of the claim."

Clearly, if Congress had refused to adopt the recommendation of the Court of Claims, and had failed to make any appropriation for the benefit of Massie, neither Calhoun nor Massie would have had any legal cause of action. The contract provided that Calhoun should receive, as a fee, "a sum equal to 50% of the amount which may be collected upon said claim." The greater right, resting in Congress, to defeat absolutely and entirely the claim of both Massie and Calhoun, necessarily carried with it the lesser right of reducing the claim of either or both of them. As stated by Judge Kelly, the case of Ball v. Halsell (*supra*) is not to be distinguished in principle from the case at bar. Counsel opposite seek to distinguish this case. We submit that it is not to be distinguished in reason. The facts are very

similar in the two cases. In the Ball case the attorney prosecuted the claim before the Department of the Interior, which Department recommended the payment, but before the sum had been paid, or Congress had made any appropriation for its payment, an Act was passed invalidating all contracts for fees in excess of 20% of the amount of recovery.

In the case at bar, Calhoun had prosecuted the case before the Court of Claims, which had not, however, and could not, render any judgment therefor, but could only recommend, and the very Act appropriating the money invalidates the fee contract, except to the extent of 20% of the amount of the recovery. It rested entirely with Congress to say whether it should pay anything, and if so upon what conditions.

We deem it unnecessary to answer at any length the position taken opposite that a chose in action is property, and that mere uncertainty as to the *"time of payment"* does not detract from a *"property right."* It is sufficient to say that the right of Calhoun here was a contingent right, not a vested right. The right was contingent entirely upon the action of Congress, and until and unless Congress did act, and make an appropriation, clearly he had no right of action, or no claim on Massie. Not only was the *"time"* of payment uncertain, but the fact as to whether there would be a claim or not was uncertain. The distinction is plain between such a claim and the case of a note or bond not yet due, or the case of an "estate in remainder" which *"once vested,* can not be taken away by legislative enactment." In short, Calhoun in his contract with Massie, had, prior to the Act of March 4, 1915, an uncertain claim, a claim dependant entirely upon the action of Congress, with no right of suit against anybody, unless and until Congress did act favorably, and Congress, thus having the right to reject the claim in whole, and defeat absolutely any claim of Calhoun, necessarily had the right to attach conditions. There was no power which could force Congress to make the appropriation.

In the case of Frisbie v. U. S., 160 U. S. 162, 39 L. Ed. 657, an Act limiting attorneys' fees in a pension case to $10.00 was sustained, and it was held to prohibit the attorneys from receiving any more than that, even though he had contracted therefor. The Gov-

ernment was no more bound to pay the war claim than it was to give the pension, and the claim for compensation for property taken during the Civil War was a simple claim, and no more, and neither Massie nor Calhoun had any vested right for the satisfaction of which they could demand an appropriation.

We once more commend to the Court the opinion of Judge Kelly (Rec., pp. 13 to 17), and also the opinion of the Court in Ralston v. Dunaway (Ark.), 184 S. W. 425.

It might be pertinent to call to the attention of the Court the fact that in its petition for writ of error, and in the reason as to why this Court should grant the same, it was stated that the case of Capital Trust Co. v. Calhoun, then pending in your Honor's Court, involved "the identical point of constitutional law herein involved," and this was the burden of the argument before the Supreme Court of Appeals of Virginia, namely: that the provision limiting the attorneys' fees was invalid, regardless of whether the fee was to be recovered from the fund actually appropriated by Congress, or from some other source. It is only since this Honorable Court has decided the Capital Trust Co. case, to the effect that the Act is constitutional, certainly so far as it prohibits the collection of attorneys' fees in excess of 20% out of the amount appropriated, that the petitioner changes his tactics, and brings his guns to bear upon the position that the Act is unconstitutional, in so far as it attempts to prohibit the collection of attorneys' fees, in excess of 20% out of any fund other than that appropriated by Congress. Very much the same line of argument is brought forward on this contention as was brought forward in the original contention, on which the decision of the Court has been against him.

If the question involved in this case is, as stated in the petition, "identical" with the question in the Capital Trust Co. case, it would seem that the decision in that case should determine this one, and we believe that the principles therein laid down do, in fact, determine the contention in this case favorably for the defendant in error.

We also call attention to the fact, that the appropriation to cover the Massie claim was subject to the provision that the amount of any fee should not exceed 20% of the amount appropriated, that the money

was actually paid, and that the petitioner, as stated in his declaration, *received and accepted a draft* of the Government for his 20% of the recovery. The declaration shows that petitioner, with full knowledge of the fact that Congress had agreed to pay this claim, upon the condition that the attorney was to receive no more than 20% thereof, in full for all services, *accepted this 20%*. We submit that such acceptance constituted a waiver on his part of any claim for an amount in excess of 20%, and should bar him forever from raising any question as to the validity of the Act, the benefits of which he has accepted.

The appropriation for Massie was voluntary on the part of Congress, and, as said by this Honorable Court, in the case of Bears v. Arkansas, 20 How. 529, 15 L. Ed. 991:

> "It is an established principle of jurisprudence in all civilized nations, that the Sovereign can not be sued in its own courts, or in any other, without its consent, and permission; but it may, if it thinks proper, waive the privilege, and permit itself to be made a defendant in a suit by individuals, or by another state, and as this permission is altogether voluntary on the part of the Sovereign, it follows that it may prescribe the terms and conditions upon which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that public justice requires it."

Or, as stated by Mr. Justice Van Devanter, in Gritts v. Fisher, 224 U. S. 640, 56 L. Ed. 928:

> "The difficulty with appellant's contention is that it treats the Act of 1892 as a contract, when it was only an Act of Congress, and can have no greater effect."

In closing we think we can not do better than to quote from the opinion of Mr. Justice McKenna, in the case of Capital Trust Co. v. Calhoun (*supra*), in which the identical statute under consideration here was involved, showing that the contentions in that case were the same as those raised here, and that the reasoning of the Court in that case applies equally to the questions raised here. This is shown by the quotation as follows:

"Liberty in any of its exertions and its protection by the Constitution are of concern. The right to bind by contract and require performance of the contract are examples of that liberty and that protection, and they might have resistless force against any interfering or imparing legislation if the contest in the case was simply one between Calhoun and the Arnold estate. But there are other elements to be considered,—there is the element of the condition Congress imposed on the subject-matter of the *controversy, regarded as a condition of its grant. Relief could only be had through legislation.* This was petitioned and the Senate of the United States was prompted to refer the claim to the Court of Claims. *A defect of remedy remained even after the Court had been thus invoked and had reported the amount and facts of the claim. Further legislation was necessary, but it could not have been compelled; it was optional, not compulsory; and it would seem to require no argument to convince that the terms of its enactment must be taken as expressed, and the relief it granted accepted with the condition imposed upon it. Indeed, the proposition is confused by its discussion.* And it is certainly difficult to deal with the distinction that counsel makes between pre-existing and prospective transactions. The right is absolute and universal, and necessarily must be to have any strength at all." (Italics ours.)

So, in this case, Calhoun had no claim, no vested right to an action against Massie, prior to the Act of Congress under consideration. The Act of Congress itself, in making the appropriation, alone gave him a right to compensation, and an Act which gives the right can necessarily limit that right. It would be the grossest bad faith, aside from the illegality of such action, for either Calhoun or Massie to accept the appropriation, and then violate the conditions subject to which it was given.

We respectfully submit that the decision of the Court of Appeals of Virginia was right, and that this Honorable Court should affirm the action thereof.

Respectfully submitted,

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